IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 758 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
KOLIBABA LAKHA & 1 - Opponents

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Appearance :
MR KT DAVE, APP for Appellant.
MR ADIL MEHTA for Opponents : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 12/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. This appeal is directed against the order of acquittal dated 28.03.1986 passed by the learned Additional Sessions Judge, Bhavnagar in Sessions Case No. 134 of 1985 whereby the learned Trial Judge acquitted both the accused from the charge of offences punishable under Section 302 read with Section 114 of Indian Penal Code and Section 135 of Bombay Police Act.

1. The respondents – original accused persons initially were charged for the offences punishable under Section 302 read with Section 34 and Section 109 of Indian Penal Code and Section 135 of Bombay Police Act. The appellant - state has assailed the acquittal on various grounds mentioned in

para 6 of the memo and the learned Assistant Public Prosecutor Mr. K.T. Dave appearing for the state has taken us through the oral as well as documentary evidence led by prosecution. For the sake of brevity and convenience, we would like to mention the facts stated in brief by the appellant in para 2 of the memo. The case of the prosecution is that the complaint was filed by Virubhai Malabhai who is resident of village Dayal and he has got six sons. The eldest son was Sivabhai. The next one is Jivabhai and third is Babubhai. All these three elder sons were residing separately from the complainant while three younger sons were residing with him. The complainant has got his house in the village which was kept closed since last two years and he used to reside in his field. The complainant's son Jiva Viru resides in the house which is adjoining to the house of the complainant situated in the village and on the other

side, one Lakha Kala was residing. The complainant's son Jiva Viru and the respondent No. 1 had dispute about watering the bullock at the water pump so they were not on speaking term. It is alleged that the complainant and his son Babubhai had gone to the field when his grandson came running and told the complainant that respondent No. 1 and the deceased Jivabhai Viru had exchange of words in which the respondent No. 1 got enraged and gave knife blow to deceased Jivabhai Virubhai. On receiving the information, the complainant went at the scene of incident and found Jiva Viru injured and he was removed to hospital and the doctor declared him died.

2. The Police registered the complaint and after investigation, charge-sheeted both the accused i.e. son and mother for the above said offences and on denial of the charge, they have been tried by the learned

Additional Sessions Judge, Bhavnagar. At the end of the trial, the learned Trial Judge acquitted the accused.

3. Backbone of the argument of Mr. K.T. Dave before us is that two eye-witnesses i.e. Vijuben and Tejuben examined by prosecution vide Exh. 20 & 21 ought to have been believed by the learned Trial Judge. Though these two witnesses are close relatives of the person deceased, but their presence at the spot of incident was natural and they have no business or reason to implicate both the accused in such a serious offence. The presence of accused No. 2 is directly established as she was found injured when arrested and she has also filed a complaint against the person deceased for the alleged assault on head by a small wooden-log popularly known as 'dhoka'. The real assailant who has given fatal blow is the accused No. 1 – son of accused No. 2 and he

had no reason to give a knife blow on the vital part like abdomen. According to Mr. Dave, the injury inflicted on the abdomen in epigastric region cavity deep and the person injured succumbed to the injury because of the profused bleeding, in couple of hours from the time of incident occurred. Mr. Dave has taken us through the judgment and reasons assigned by the learned Trial Judge recording acquittal.

4. In response of the query raised by us, Mr. Dave has submitted that theory of self-defence ought not to have been accepted and at least accused No. 1 could have been held guilty observing that he has acceded the right of private defence.

5. The submission of Mr. Adil Mehta, learned advocate appearing for the respondents – accused is that the finding recorded by the learned Trial Judge is absolutely legal and in accordance with law. No error in

appreciation of evidence can be said to have been committed by the learned Trial Judge and merely other view could have been taken by the learned Trial Judge would not confer the jurisdiction to reverse the acquittal on this Court because it is a settled legal position that normally, the acquittal should not be reversed because one other view also is possible. According to Mr. Mehta, presence of Vijuben at the scene of offence is found doubtful. Undisputedly, she is a married lady, but it is the say of the witness Vijuben that because of some marriage in the family, she had come to her parental home. Her normal presence would be at her matrimonial home. The question raised by Mr. Mehta before us is that if she had been at her parental home on the occasion of marriage, then her normal presence would be at the place of marriage and not at the residence of her parents. It is stated by her that she was feeding her child when she heard

some hub-hub and, therefore, she came out of the house and at that time, according to Vijuben, the accused No. 1 was about to give the knife blow to the person deceased Jivabhai. According to Mr. Mehta, plain reading of deposition of Vijuben and Tejuben examined vide Exh. 20 & 21 does not inspire the confidence that she were an eye-witnesses to the incident. On the contrary, it emerges indirectly that she had reached to the spot after some minutes of the alleged assault. On perusal of the record, it is clear that when the incident occurred, the accused No. 2 was of about 35 to 36 years of age and her son must be below 20 years of age. In the deposition of Investigating Officer, it has come on record that the accused No. 2 i.e. mother of accused No. 1 was assaulted by deceased and she was given blows on her head and she had sustained a visible bleeding injury on her head. It is in the evidence that when she was arrested by police for the

very offence, she was found with a band-aid given by the Govt. hospital. When it is not a matter of serious dispute that accused No. 2 had sustained injuries on her head, then in this background, the oral evidence of two eye-witnesses i.e. Vijuben and Tejuben was required to be scanned closely. None of these two witnesses even attempted to explain the injuries found on the person accused No. 2. It is the say of the accused No. 1 that deceased Jivabhai who was aged about 35 years of age at the time of incident had pushed him on the earth and was about to press his neck and in that scuffle, only with a view to save himself from death or grievous hurt, he gave blows to deceased Jivabhai. According to Mr. Mehta, the bold defence taken by the accused No. 1 has been rightly appreciated. According to us, Vijuben is found a chance witness and presence of Tejuben at the time of incident is found doubtful. The very important witness Dama who had informed his grandfather - the

complainant, has not been examined. We have reason to believe that complaint must have been lodged on the information given by Dama to the complainant. So the evidence of complainant would not carry the case of prosecution any further in absence of oral evidence of Dama as the version of the complainant can be considered with the evidence based on hearsay things. Unless Dama is examined and states before the Court on oath that he had narrated the incident in a particular manner to the complainant, only then some weightage can be given to the say of the complainant.

6. While examining the case of the prosecution closely, the Court can consider the case placed by it at initial stage. Plain reading of the FIR to appreciate the strength of the truth in the deposition of eye-witnesses takes us to a conclusion that involvement of accused No. 2 in the crime is a material

improvement at subsequent stage. Basic case of the prosecution placed before the Police in the FIR was that Dama, son of deceased Jivabhai had informed complainant Virubhai, his grandfather that accused No. 1 has given a knife blow to his father Jivabhai and he has fallen down. After reaching to the spot, the complainant gathered the information that the deceased has sustained injury on the abdomen. The FIR is registered after the death of the person deceased. In this fact situation, none disclosure of the role played by accused No. 2 becomes very relevant and according to us, the learned Trial Judge has appreciated all relevant aspects and, therefore, the self defence has been believed. Only one serious blow has been given by the accused No. 1 to the person deceased and the other injury found on the shoulder is of super furious nature. So, it will be difficult for the Court to infer that the intention of the accused No. 1 while

giving blow was to commit murder. Otherwise, he could have inflicted more number of blows being a young man between 18 and 20 years of age. When indirectly it emerges from the record that deceased Jivabhai was holding a wooden-log i.e. 'Dhoka', it was not possible for accused No. 1 to give more number of blows, otherwise he himself could have sustained some injury like his mother. The reaction of accused No. 1 to enter between the quarrel of his mother and Jivabhai can be said to be obvious and natural and this intervention cannot be said to be an act with an intention to commit murder or any other serious offence. We have gone through one decision of the Apex Court placed before us in the case of **Rizan and another V/s. State of Chhatisgarh, through the Chief Secretary, Govt. of Chhatisgarh, Raipur** reported in **2003 AIR SCW 469**. According to us, the finding recorded by the learned Trial Judge is found legal and it is

difficult for us to say that it is either perverse or based on illegal appreciation of evidence.

7. The reasons recorded by the learned Trial Judge are logical and there is no element of perversity or patent illegality. The Apex Court in a decision in the case of **Dwarkadas V/s. State of Haryana**, reported in **(2002) 1 SCC 204**, has reiterated the principles of law where it has been held that the judgment and order of acquittal normally should not be reversed merely because the other view is possible. In the same way, the observations of the Apex Court in the case of **Kanshiram V/s. State of Madhya Pradesh** (Re. Para 21), reported in **AIR 2001 SC 2902**, in respect of appeal against the order of acquittal, positively would help the accused. As per the settled legal position, while appreciating the order of acquittal, the Court should go slow in reversing the order of acquittal

unless the order is absolutely illegal and perverse.

8. For short, according to us, the finding recorded by the learned Trial Judge of acquittal is absolutely legal and is not required to be interfered. The appeal of the state is hereby dismissed. Rule discharged without any order as to costs.

[C.K. BUCH, J.] [K.A. PUJ, J.]

S*avariya*